

No. 19803

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

GOLDEN STATE BOTTLING COMPANY, INC., d/b/a PEPSI-
COLA BOTTLING COMPANY OF SACRAMENTO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR REHEARING.

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To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

1. Petitioner's brief merely resubmits the argument advanced previously to the effect that the cause should be remanded to the Board for a determination of the question "whether the record would warrant a finding that the lockout as illegally motivated and hence unlawful despite the intervening decision of the Supreme Court in *American Ship Building v. N.L.R.B.*, 340 U.S. 300." As this Court pointed out in its decision, the Board fully considered the question of Respondent's motivation when the cause was first before it and made extensive findings in that connection. This Court's de-

cision disagreed with those findings both as to factual import and legal effect. It properly concluded, as a consequence, that the lock-out, under the circumstances, did *not* constitute an unfair labor practice. The issue has been decided. There is patently no basis for this second attempt to secure another decision on the same question.

2. The decision of the Supreme Court in the case of *Newspaper Drivers v. Detroit Newspaper Publishers*, 382 U.S. 374, cited in Petitioner's Brief, in no way affects the validity of this Court's earlier decision herein. Neither does it afford any new ground for a reconsideration of matters already determined and settled. *Detroit Newspapers* involved a factual situation which placed it outside the stated scope of the rule enunciated in *American Ship Building*. In the latter case, an impasse had been reached between the employer and the Union, and the lock-out was utilized by the employer in support of its legitimate bargaining position. The *identical situation* to *American Ship* existed in the within cause, as this Court found. That is to say, the lock-out was resorted to only after an impasse had resulted, and in support of the employer's legitimate bargaining position in that context.

In *Detroit Newspapers*, the employer in question locked out its employees while negotiations were still in progress and before there was even any threat of impasse. The lock-out was admittedly resorted to in aid

of the bargaining position of *another* local newspaper *publisher* which had been struck by the same union. Admittedly, also, the two newspapers did not conduct bargaining on a multi-employer basis. (*Cf. N.L.R.B. v. Brown* (1965), 380 U.S. 278, 85 S. Ct. 980, 13 L. Ed. 2d 839). The case thus presented a situation not contemplated by the Court in *American Ship Building*, irrespective of motivation. The Supreme Court, therefore, clearly wished to afford to the Labor Board an opportunity to express its view of the matter, consonant with *American Ship Building*, before setting a new course in hitherto uncharted waters. These considerations are completely absent from the case at bar, which is on all fours with the substantive aspects of *American Ship Building*, as this Court has already correctly held.

3. With respect to Petitioner's request that this Court also remand to the Board for its reconsideration paragraph 1(d) of the Board's order, such request is patently without merit. What Petitioner is truly requesting is another chance for the Board to reconsider virtually all aspects of the case on which it was reversed. That issue was decided and resolved by this Court. There is no need for additional reconsideration. There must be an end to litigation.

Respondent therefore urges that the subject Petition be denied. If, however, the Court should be at all disposed to concur with Petitioner's view, Respondent

then requests that the matter be set down for hearing and oral argument upon the Court's motion calendar in order that Respondent be afforded an opportunity to be heard prior to ruling.

Respectfully submitted,

HILL, FARRER & BURRILL,

By M. B. JACKSON and

EDWIN H. FRANZEN,

Attorneys for Respondent.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

EDWIN H. FRANZEN

